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No. 1066

In the Supreme Court of the United States

OCTOBER TERM, 1962

PAUL A. GORIN, HENRY GRILLO AND SAUL GLASSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 23-48) is reported at 313 F. 2d 641.

JURISDICTION

The judgment of the court of appeals (Pet. 49) was entered on February 20, 1963. The United States filed a petition for rehearing (R. 1435-1442)

which was denied on April 3, 1963 (R. 1443). The petition for a writ of certiorari was filed on April 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, rather than reversing the conviction and ordering a new trial, should have dismissed the indictment, or granted a judgment of acquittal on the ground of entrapment.

STATEMENT

Petitioners and Nathaniel Bergman were convicted as charged in the District Court for Massachusetts under an indictment charging (1) all defendants with conspiracy to bribe Charles J. McCaffrey, an employee of the Internal Revenue Service, and to defraud the United States; (2) Glassman, Gorin and Bergman with giving $10,000 to McCaffrey with intent to bribe; (3) Grillo alone with conspiracy to defraud the United States of his services as an internal revenue officer.

On appeal, the court of appeals reversed the judgments of conviction and remanded the case for a new trial on the ground that the court had not sufficiently instructed the jury on the burden of proof required for the defense of entrapment. The court rejected petitioners' contention that entrapment was established as a matter of law. Petitioners challenge this ruling and also contend that the indictment should have been dismissed because the grand jury

was biased by pre-indictment publicity and was indirectly selected from voting registration lists.

ARGUMENT

1. The only issue on the facts is whether the court of appeals should have found entrapment as a matter of law. The pertinent evidence, including that of petitioner Glassman on which all the petitioners rely, supports the ruling of the court of appeals that the issue was for the jury.

a. With a view to possible criminal prosecution, the Internal Revenue Service was investigating the income tax returns of Nathaniel Bergman, a Connecticut lawyer who was represented by petitioner Gorin (R. 282, 1021). In May 1961, a recommendation for criminal prosecution of Bergman was sent to the Boston regional office of the Intelligence Division of the Internal Revenue Service where petitioner Grillo was an executive assistant (R. 1022, 1380-1381), and then to the Boston Regional Counsel's office for review by its Enforcement Branch, headed by Charles J. McCaffrey who was a training officer in a Marine Corps reserve unit commanded by petitioner Glassman (R. 236, 242, 442).

Glassman testified that in May 1961, he told Gorin that he had a good friend in Enforcement who could help in any tax fraud matters and Gorin asked if he could do anything with the Bergman case (R. 1143-1145). On June 1, 1961, Glassman came to McCaffrey's office to discuss the Bergman case (R. 249-250). McCaffrey knew that Glassman had

not been admitted to practice before the Treasury Department and that no power of attorney authorizing Glassman to appear in Bergman's behalf had been filed. McCaffrey disclosed that the government had an extremely strong case against Bergman, specifying the amounts of the proposed tax deficiencies and other facts of the case. Glassman responded that there should be "enough of a fee in it for all of us" and McCaffrey replied "Oh?" or "That may be so" (R. 251-252). McCaffrey, who had mentioned the first telephone call to a fellow government attorney, reported these conversations to a superior. Because of their doubt as to the meaning of Glassman's remarks, they decided to delay referring the matter to the Inspection Service for investigation (R. 246, 253, 882-883, 962).

On the evening of June 14, 1961, Glassman told McCaffrey that he had been visited by a friend of Bergman and had asked for $35,000 in escrow, payable if the Bergman case was quashed in McCaffrey's office. McCaffrey replied, "Well, that sounds all right", or "We'll have to play it by ear" (R. 254-256). The next morning McCaffrey reported this conversation to the Inspection Service which gave him instructions as to his future conduct in the Bergman case (R. 130, 257-258, 493).

Glassman testified that on June 16, 1961, he and Gorin met and, upon the latter's suggestion, set the fee at $25,000 or $30,000 (R. 1157-1158). Telephone company records revealed a call from Glassman's office to Bergman's office on June 19 (R. 1399-1400).

On June 20, 1961, McCaffrey informed Glassman by telephone that he personally would review the Bergman case (R. 264-265, 341). Later that day, Glassman told McCaffrey that he planned to ask Bergman that night for $30,000 in escrow, the fee to be based on a determination against criminal prosecution. Glassman said that Bergman would be required to put up part of the money in cash. McCaffrey responded, "Saul, we know what we're talking about. Let's lay it on the line. What do you have in mind for me?" Glassman suggested that McCaffrey should receive between $10,000 and $15,000. Glassman added that he knew of two other cases coming up and that "This thing can start to snowball" (R. 341-342, 512-513).

That night, Glassman testified, at a meeting with Gorin and Bergman, it was agreed that Bergman was to put up $50,000, including $15,000 in cash, and that half of the fee was to be paid when the Regional Counsel's office recommended no prosecution (R. 1175-1178).

On June 21, 1961, at a regular Marine Corps reserve meeting, Glassman told McCaffrey that Bergman had agreed to everything. When McCaffrey asked whether anyone would want to read his memorandum recommending against prosecution, Glassman replied that he would. McCaffrey agreed to bring a draft of the memorandum to Glassman's office on June 27 (R. 346-347).

Glassman testified that, at a meeting with Gorin and Bergman on June 27, Bergman gave him $15,000 in one hundred dollar bills and that Gorin told him

that the balance of the money was in his bank account (R. 1114, 1196-1197). On that date checks totalling $41,500 drawn by Bergman payable to Gorin as trustee and marked "Per agreement of even date between the maker and the payee" were deposited in a new account opened in the name of Gorin and his brother as trustees (R. 1388-1389). That afternoon Glassman, at his office, told McCaffrey that he had $15,000. McCaffrey showed him a draft of the memorandum recommending no criminal action against Bergman and permitted Glassman to photostat it. Glassman gave McCaffrey $5,000 in one hundred dollar bills, and told him that he would be paid $10,000. Glassman thought that the record should show something from Gorin as a basis for the discussion set forth in the criminal action memorandum, and McCaffrey suggested a back-dated letter (R. 268-271, 347-351). On July 10, McCaffrey received the back-dated letter signed by Gorin (R. 374). He had been given an additional $5,000 on June 28.

Under the practice of the Internal Revenue Service, the Regional Intelligence office had the duty of determining whether to support the recommendation in the criminal action memorandum or file a protest (R. 239-241). Both on June 27 and June 28, in conversations between Glassman and McCaffrey, the name of Grillo was mentioned as the man who had been approached in the Regional Intelligence office (R. 349, 369-370). On July 10, McCaffrey received a letter from the Intelligence Division at Hartford that it intended to protest the memorandum (R. 277). On July 13, McCaffrey, in the course of a conversation with Grillo about another

tax case, asked him if he had read the memorandum in the Bergman case. Grillo stated that he concurred with the memorandum except for its criticism of the Special Agent's investigation (R. 280).

On July 20, 1961, McCaffrey met with Gorin. Gorin stated that he and Grillo were close personal friends and that Grillo also wanted to kill the case. Gorin told McCaffrey that he "would much rather kill a case in [his] office than over in Intelligence because instead of being worth $10,000 it would be worth $50,000". He offered to pay for a trip to New York or Paris for McCaffrey and his wife, asking him if he would like to "pick up a half dozen suits at $250 a copy" (R. 293, 377-384). Subsequently, he bought him a set of golf clubs (R. 301).

Between July 26, and August 10, Gorin and McCaffrey had numerous conversations and meetings about the Bergman case. Gorin said that Grillo planned to give him a list of cases coming from Hartford and requested a similar list from McCaffrey (R. 304, 387-390). On August 10, when Gorin asked if McCaffrey had read the protest, which had been prepared by the Intelligence Division, McCaffrey replied that it appeared formidable and that it might be necessary to meet with Grillo to determine what could be done about it (R. 313).

On August 14, Gorin and McCaffrey met, talked about the protest, and telephoned Grillo who could not talk because a superior was present. In a later conversation, Grillo told McCaffrey that he had tried to stop the protest but was unsuccessful (R. 318-320). Later that day, Grillo was seen going into the build-

ing where Gorin had his office (R. 202-203). Gorin subsequently told McCaffrey that Grillo would talk to him the next day (R. 394). Gorin informed McCaffrey that he had given Grillo $1,500 on the case and that he had promised him $2,500 more "if the protest is killed" (R. 394-395, 397).

The next morning Gorin and Grillo came together to McCaffrey's office (R. 410). Grillo gave McCaffrey's suggested arguments to counter the protest of the Intelligence Division. He said, "This is a case that I went through a long time ago, long before you got into it, and Paul is aware of this. I don't get many calls from Paul on cases but I did on this case and that's the reason I know this case quite well. I personally went into it and I couldn't make any headway with it so I dropped it." He also said "I would like to see it go by the board more than anyone else". At the conclusion of the conversation, Gorin said "Well, Henry you've got the pitch now. The three of us are working together" (R. 410-415).

On August 26, 1961, Bergman, Gorin and Glassman were arrested (R. 1386). On August 29, 1961, Gorin withdrew the $29,000 balance remaining in his trustee bank account and returned it to Bergman (R. 1389-1390).

b. This evidence refutes petitioners' arguments that the crimes were originated by McCaffrey, that he suggested the payoff, and that he used Glassman as a pawn to entrap Gorin. Glassman's own testimony that before he spoke to McCaffrey he and Gorin talked of using a good friend in Enforcement to assist in the Bergman case shows that the crime did not

originate with government officials. Nor did the first suggestion of payment come from McCaffrey, as petitioners argue. Before McCaffrey asked Glassman what he had in mind for him, Glassman had already told McCaffrey that he had sought $30,000 or $35,000 conditioned upon the criminal case being dropped by McCaffrey's office. He had also informed McCaffrey that the Bergman case should provide "enough of a fee for all of us".

The evidence does not show that, as a matter of law, Gorin was entrapped into bribery by McCaffrey. The disclosure by McCaffrey to Glassman of information about the Bergman case, whether proper or not, cannot be said, as a matter of law, to constitute such an inducement as would lead an experienced lawyer to commit the crime of bribery. It falls far short of the conduct involved in *Sherman* v. *United States*, 356 U.S. 369, where this Court found entrapment in an appeal to a narcotic addict, trying to overcome the narcotic habit, to assist a purported fellow narcotic victim to relieve his sufferings. Nor was Gorin moved to action because he saw McCaffrey's memorandum recommending against the criminal prosecution of Bergman. Prior to seeing the memorandum, he was present when Bergman delivered $15,000 in cash to Glassman to end the case.

As for Grillo, the plain meaning of his own remarks is that he and Gorin tried to quash the prosecution of Bergman at an earlier stage of the investigation.

The court of appeals was therefore justified in di-

recting a new trial, rather than a verdict of acquittal, when it reversed the conviction.[1]

2. There was no reason to dismiss the indictment.

a. On the weekend of their arrest, nine days before the indictment, newspaper articles quoted the Attorney General as stating that the case had been skillfully investigated and that McCaffrey was a "courageous American and typifies the loyality and integrity of the men of the Internal Revenue Service." This publicity, petitioners argue, was so calculated to bias the grand jury against them that it vitiates the indictment. The fact is, however, that the publicity involved could not have prejudiced the proceedings conducted by the grand jury. The government in presenting its case before the grand jury would as a matter of course endorse the credibility of McCaffrey. The statements complained of go no further in vouching for his integrity.

b. Nor is there any merit in petitioners' other attack on the indictment based upon jury selection. The jurors who indicted petitioners were drawn out of the federal jury box from names selected from state jury lists, which in turn had been taken from registered voting lists after state officials had weeded out il-

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[1] Petitioners also challenge the sufficiency of some of the overt acts alleged. But, whatever the merits of the contention, the fact is that the conspiracy charged under count 1, arising under 18 U.S.C. 371, requires the commission of only one overt act and the conspiracy charged under count 3, arising under 26 U.S.C. 7214(a)(4), does not require any overt act.

literates, felons and all persons exempt from jury service under state law, Mass. G.L. c. 234, § 1 (R. 110-128). Under federal law, any adult citizen is eligible for federal jury service unless he is a felon, illiterate in English or physically or mentally incapacitated. Exempt or excluded from such service are public officials, members of the armed forces and groups or classes whose service the district court finds would cause undue hardship. Congress has not, however, specified the means by which names of prospective jurors are to be obtained, delegating to the jury commission the task of selecting qualified jurors. 28 U.S.C. 1861 *et seq.* Thus the state and federal selection standards are essentially the same and, it seems to us, in a large metropolitan, politically conscious city such as Boston, the voting lists are as reasonable a method as any for obtaining a fair cross-section of the community. See *United States* v. *Agueci*, 310 F. 2d 817, 833-834 (C.A. 2), certiorari denied, 372 U. S. 959, so ruling as to selection based on voting lists in New York City.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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